No. 21542

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN F. CRANE AND JOHN E. MARSH,

Appellants,

vs.

STATE OF CALIFORNIA, ET AL.,

Appellees.

REPLY BRIEF OF APPELLEES COPLEY PRESS, INC. AND UNION TRIBUNE PUBLISHING CO.

HENRY E. KAPPLER
Suite 321 Sunset-Vine Tower
6290 Sunset Boulevard
Los Angeles, California 90028
Attorney for Appellees

Jeffries Banknote Company, Los Angeles — MA 7-9514

TOPICAL INDEX

Attorneys for Appellee,
United States of America.

TABLE OF AUTHORITIES CITED

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JURISDICTIONAL STATEMENT

Appellants' claim of jurisdiction rests upon 28 USC 1331 (a) and (b) and 1332 (Opening Brief p. iii; p. 25 l. 8-26) although countless other statutes and constitutional provisions are set forth on p. ii, none of which are applicable to these appellees, who assert that the District Court had no jurisdiction over any purported cause of action which appellants may have against these appellees.

No diversity of citizenship exists in this case of the type sufficient to confer jurisdiction upon the United States District Court. Diversity jurisdiction contemplates a *complete* diversity between plaintiffs on the one hand and defendants on the other. No such diversity of citizenship exists here. Both plaintiffs are citizens of California.

Attorneys for Appellee,
United States of America.

Most, if not all of the defendants are also citizens of California, and there is no basis for any claim of Federal Jurisdiction predicated upon Diversity of Citizenship.

Appellees are publishers of newspapers who allegedly published a libel concerning plaintiffs (Opening Brief p. 65; p. 12; Appendix p. 34, 51, 52).

Libel is a tort cognizable under the laws of the State of California. (See Civil Code 45.) No Federally protected right is involved and none is shown by appellants in the countless pages of charges against these appellees.

STATEMENT OF FACTS

Appellants John F. Crane and John E. Marsh were arrested in San Diego on various charges, tried and convicted. An appeal was taken to the California Appellate Courts and ultimately a decision was rendered by the Supreme Court of the State of California entitled *People vs. Marsh,* 58 Cal.2d 732 (1962). The facts are set forth in the opinion which affirmed at least a portion of the judgment of conviction. Thereafter Crane and Marsh served some time in the penitentiary. Following their release they commenced an original action in the United States Court of Appeals (Nov. 4, 1964). This action was dismissed by this Court (O.B. p. 23). An appeal was denied by the Supreme Court of the United States and thereafter the lawsuit was refiled in 1966 in the United States District Court and dismissed by the District Court with leave to amend. A supplemental and amended complaint was then filed (O.B. p. 24) purporting to set forth 39 causes of action.

A motion to dismiss was filed on behalf of these appellees. The grounds of the motion included the assertion that the "supplement No. 1 and amended complaint" failed to state a cause of action within the jurisdiction of the United States District Court in that the complaint on its face did not set forth any diversity of citizenship.

It was further claimed that any purported cause of action against appellees was barred by Section 340(3) of the Code of Civil Procedure of the State of California. Additionally it was claimed that the complaint on its face did not set forth any cause of action predicated upon the breach of any Federal right or Federal law.

The Court thereafter granted the motion of appellees and this appeal has followed.

It is almost impossible to ferret out from amongst the countless pages of material *any* charges against these appellees, let alone any allegations which would be sufficient to create any cause of action, be it common law or by reason of some Federally created right.

The thrust of appellants complaint appears to be directed against the State of California, the City and County of San Diego, the Department of Public Health of the State of California, all of the members of the Supreme Court of the State of California (i.e. the justices who participated in the decision in *People v. Marsh,* 58 Cal.2d 732, 26 Cal.Rptr. 300) as well as countless individuals connected in some manner with the prosecution of the criminal case.

The sole participation of appellees Copley Press and Union Tribune Publishing Co. appears to have been by

Attorneys for Appellee,
United States of America.

reason of a publication on November 19, 1960, of a newspaper account of the arrest of the appellants in connection with a two year investigation of a cancer cure racket and the fact that three persons were charged in the District Attorney's complaint with grand theft and conspiracy. (App. P. 51; Supplement No. 1 and amended complaint p. 2; p. 5).

So far as appellees can determine this is the *only* tort claimed to have been committed by them. Appellees have reviewed the opening brief under the caption "Argument" (pp. 42-74) and note that the single caption, "K. Libel and Slander" p. 65 is the only one which could possibly apply to these appellees. The "argument" is in fact *no argument*. No point is raised. The alleged libel is not set forth. No authorities are set forth. There appears to be no correlation between this point in the argument and the fifty specifications of errors set forth in Opening Brief 33 to 41, only one of which even remotely relates to libel. It reads as follows: (No. 22 O.B. p. 34) "(22) Trial court joined in libel and slander feloniously." This specification could scarcely be intended to relate to these appellees whose publication was months and months *prior* to the criminal trial of the appellants and clearly unrelated to any subsequent conduct of the trial judge and others involved in the criminal proceeding.

CONTENTIONS OF APPELLEES

Appellees make the following contentions:

1. There is no allegation in any of the material which has been filed with this court setting forth a

diversity of citizenship between the plaintiffs and these appellees.

2. There are no allegations in any of the pleadings which allege the violation by these appellees of any Federally created right or the violation of any Constitutional right.

3. The purported cause of action appears on its face to involve a claim of libel published on November 19th of 1960. In the Federal Court it is well settled that the statute of limitations of the State wherein the District Court is located is the applicable statute of limitations. In California the limitation of actions in connection with an action for libel is found in Code of Civil Procedure Section 340(3) wherein a one year statute of limitations is provided. There are no facts set forth on the face of the complaint which would in any manner toll the running of the statute of limitations.

ARGUMENT

I

WHERE JURISDICTION IS PREDICATED UPON DIVERSITY OF CITIZENSHIP, THERE MUST BE APPROPRIATE ALLEGATIONS IN THE PLEADINGS SETTING FORTH THE DIVERSITY

Plaintiffs' complaint, amended, appears to attempt on its face (p. 2 lines 14 to 32) to set forth a cause of action based upon an alleged libel published on November 19, 1960. There are no allegations in the amended complaint or in any other pleading alleging a diversity of citizenship between the plaintiffs and these appellees. Since the action

against these appellees is predicated solely upon a common law claim of libel as codified in the California Civil Code Section 45, it is apparent that the only basis for jurisdiction against these appellees must be upon the theory of diversity of citizenship. That appellants were relying upon diversity as a basis for the jurisdiction of the District Court is apparent from Page iii of the Brief of appellants. In the statement of jurisdiction filed in this court, there is no suggestion that any jurisdiction is claimed to exist against these appellees, predicated upon the violation of any Federal Law or Federal right.

It is well settled that facts which are essential to Federal jurisdiction must be set forth in the pleadings.

Alexander v. Westgate Greenland Co.,
(CCA Cal.) 111 Fed.2d 769.

McNutt v. General Motors, 298 US 178.

It is further fundamental that where jurisdiction is predicated upon diversity of citizenship, such diversity must appear on the face of the pleadings.

More fundamentally it must appear that no plaintiff is a citizen of the same state with any defendant, is diversity must be complete.

Merserole v. Union Paper Collar Co.,
17 Fed.Cas. 488.

Evarts v. Jones (CCA Cal.),
228 Fed.2d 105.

Caraway v. Ford Motor Co., 144 Fed.2d 295.

It is apparent from the pleadings of the appellants that they are residents of the State of California. Ob-

viously the great majority of the defendants are likewise residents of the State of California and there is no allegation in the pleadings, original or amended nor is there any assertion in the briefs, that these appellees Union Tribune Publishing Co. and Copley Press Inc. were anything other than citizens of the State of California. It is submitted that the ruling of the trial court was clearly proper and that there was no jurisdiction to entertain the plaintiffs complaint against these appellees. See *Treiner v. Sunshine Mining Co.*, 308 US 66.

II

NO VIOLATION OF ANY FEDERAL LAW OR FEDERALLY CREATED RIGHT IS SET FORTH IN THE APPELLANTS' PLEADINGS

Even though no diversity of citizenship exists, it would be possible in certain cases for jurisdiction to be laid in the Federal Court. While as to certain of the defendants perhaps, there are charges that the appellees constitutional rights have been infringed upon, any purported cause of action against the appellees Copley Press and Union Tribune Publishing Co. appear to be founded solely upon a common law tort as codified in Section 45 of the California Civil Code, to-wit, libel. Obviously the State Courts of California have jurisdiction over such a cause of action. There is nothing in the complaints or in the briefs to suggest any other or different cause of action against these appellees than the purported cause of action for libel.

Where the cause of action (libel in this case) is created by State law no basis exists for federal jurisdiction. cf. *Moore v. Chesapeake & O. Ry. Co.*, 291 US 205.

Attorneys for Appellee,
United States of America.

Here again it is essential that the appellants in their pleadings set forth facts which demonstrate the existence of Federal jurisdiction by a well pleaded complaint. This has not been done. See *Alexander vs. Westgate Greenland Co.* (CAA Cal.), 111 Fed.2d 769 (supra).

III

THE ACTION OF THE COURT IN DISMISSING THE AMENDED AND SUPPLEMENTAL COMPLAINT WAS PROPER SINCE IT WAS DEMONSTRATED ON THE FACE OF THE COMPLAINT THAT ANY PURPORTED CAUSE OF ACTION WAS BARRED BY THE PROVISIONS OF CALIFORNIA CODE OF CIVIL PROCEDURE, SECTION 340(3)

It is well settled in California that an action for damages for libel must be commenced within one year from the date of the wrongful act. The alleged publications charged against these defendants are apparently set forth on page 2 of the amended complaint wherein the date of November 19, 1960 is alleged. While other publications are alleged to relate to other defendants on different dates, these appear to be unrelated to any claim against these appellees. It is respectfully submitted that there is nothing on the face of the amended and supplemental complaint to take the case out of the one year statute of limitation and that the supplemental and amended complaint on its face demonstrates that it is barred and that plaintiffs have no cause or causes of action.

See *Belli v. Roberts Bros. Furs,* 240 ACA 295, 49 Cal.Rptr. 625 (1966).

California Code of Civil Procedure 340 provides in part as follows: "Within one year: * * * 3. action for libel, slander * * * ".

The rule is well settled in Federal courts that the limitation statute of the jurisdiction wherein the suit is brought will govern.

See *Schram v. Robertson* (CCA Cal.), 111 Fed.2d 722 (1940).

CONCLUSION

It is respectfully submitted that the action of the District Court was the only proper action which could have been taken insofar as these appellees are concerned and that the judgment of dismissal should be affirmed.

Respectfully submitted.

HENRY E. KAPPLER

Attorney for Appellees
Copley Press, Inc. and
Union Tribune Publishing
Company

CERTIFICATE OF FILING ATTORNEY

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

HENRY E. KAPPLER

United States of America.